Supreme Court, U.S.
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No. 95-1141

In The

Supreme Court of the United States

October Term, 1995

MARY BEDDINGFIELD, JANET COCCHI, JUDY DICK and VALERIE ZYSKOWSKI,

Petitioners,

v.

COUNTY OF ALLEGHENY, CITY OF PITTSBURGH, CHARLES R. KOZAKIEWICZ and MAYER DEROY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTION PRESENTED

Does a Federal Court sitting in diversity err in applying the law as stated by the highest court of the state whose law is being applied rather than the law as stated by an intermediate appellate court in the same jurisdiction?

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OPINIONS AND JUDGMENTS IN THE COURTS BELOW

The Opinion of the United States District Court for the Western District of Pennsylvania authored by Chief Judge Donald E. Ziegler is reported at 860 F.Supp. 1080. Further, the decision of the United States Court of Appeals for the Third Circuit authored by Judge Scirica and joined by Judge Becker and Judge Wood, is reported at 60 F.3d 1010. Both of these Opinions are reproduced in the Appendix to the Petitioners' Petition for Writ of Certiorari.

COUNTER-STATEMENT OF THE CASE

On March 11, 1989, nearly seven years ago, Petitioners, professional pro-life protesters, participated in a demonstration. They were arrested, detained at the City of Pittsburgh lock-up, the Allegheny County Jail and Mayview State Hospital and were subsequently released. The Petitioners have alleged that their civil rights were violated during this process. Specifically, they allege that they were sexually harassed and treated with excessive force.

Approximately two years later this action was commenced by the filing of a Complaint which was amended prior to service upon the Defendants. The Amended Complaint was filed on February 21, 1991, precisely eighteen days prior to the expiration of the applicable statute

of limitations.[1] Motions to Dismiss filed on behalf of certain Defendants were timely filed. At that time, the Petitioners proposed a class certification and sought conversion of the Motions to Dismiss to Motions for Summary Judgment pursuant to F.R.C.P. 56.

In the interim, Petitioners' request for class certification of a plaintiff class was denied on November 22, 1991 due to the failure of Petitioners' counsel to timely seek such certification. At the time the Order was entered, the District Court cautioned Petitioners' counsel that all individuals desiring to file claims should act promptly due to the pending expiration of the statute of limitations. No appeal has ever been taken from that Order.

The Petitioners, rather, filed a Second Amended Complaint on December 9, 1991 setting forth allegations against a defendant class. This Defendant class included unidentified "Moe" Defendants previously dismissed by Order of Court and, conceivably other County employees not identified in the prior Complaints. Service of the Second Amended Complaint was made upon counsel for the County, the Warden of the County Prison, the City and Mayer DeRoy, the City's Chief of Police, through counsel who appeared of record. No attempt at service upon any of the Moe Defendants was effectuated. These individuals have never been identified on the record by the Petitioners. For all practical intents and purposes

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[1] Pennsylvania law provides for a two-year statute of limitations period for personal injury claims. 42 Pa.C.S. § 5524. This two-year statute of limitations is applicable to the Petitioners' 42 U.S.C. § 1983 claims pursuant to *Board of Regents v. Tomanio*, 446 U.S. 478 (1980).

there is no record of any County employee, other than the Warden, having received notice of this action at any time.

Subsequently, and pursuant to Court Order, Petitioners filed a Third Amended Complaint on January 10, 1992. The Plaintiffs identified in the Third Amended Complaint included Amnesty America[2] suing in its representative capacity on behalf of certain Jane Doe plaintiffs.

The County Defendants filed a Motion to Dismiss the Third Amended Complaint. On April 23, 1993, Chief Judge Donald E. Ziegler entered an Order addressing the issues raised by the Defendants' Motions to Dismiss as well as the Petitioners' request for Defendant class certification.

The Court's April 23, 1993 Order denied Petitioners' Motion for Certification of the Defendant class, on the basis that the Petitioners could not meet the requirements for certification pursuant to F.R.C.P. 23(a) and (b)(3).

By Order of Court dated February 17, 1994, the District Court compelled the Petitioners to file a Fourth Amended Complaint identifying with specificity the identity of six women who were to proceed in their individual capacities. On or about March 17, 1994, the Plaintiffs filed a Fourth Amended Complaint which amended the captioned to specifically identify five

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[2] Amnesty America is a self-described "propriety organization" owned and operated by an individual by the name of Richard Bruno and is "devoted exclusively to ensuring the protection of the civil rights of and assistance to pro-life demonstrators in the criminal justice system in the United States of America." Third Amended Complaint at ¶ 4.

women who were proceeding in this individual capacity. In addition, the Fourth Amended Complaint listed two additional Plaintiffs: two of the Petitioners, Janet Cocchi and Mary Beddingfield, who had not previously been identified as individual Plaintiffs. Further, the Fourth Amended Complaint asserted claims previously dismissed by various Order of Court, including the reassertion of Defendant class allegations and claims on behalf of Amnesty America.

On or about May 31, 1994, a Motion to Intervene was filed on behalf of the other two Petitioners Judy Dick and Valerie Zyskowski. The Motion to Intervene lacked a supporting Brief and was deficient in both form and substance under F.R.C.P. 24. In response to the attempt by the Petitioners to improperly expand the parties to this action, the Defendants filed a Motion to Dismiss/Motion for Sanctions to the Fourth Amended Complaint. The Motion sought the dismissal of Cocchi's and Beddingfield's claims based on the expiration of the applicable statute of limitations.

Additionally, the Defendants filed a Motion to Strike the Motion for Intervention asserting that the applicable statute of limitations had long expired and the Motion to Intervene was procedurally defective. In an Opinion and Order dated August 15, 1994, Chief Judge Ziegler addressed both such Motions.

The District Court reviewed the procedural background of the case in evaluating the Defendants' claims of untimeliness with respect to the Petitioners' attempts to join the lawsuit. The Court ruled that the joinder was untimely and barred by the expiration of the applicable

two-year period of limitations. In so holding, the District Court thoroughly reviewed Pennsylvania case law addressing the tolling effect of a class action lawsuit with respect to the claims of putative class members. The Court properly concluded that the filing of a class action lawsuit merely suspended the applicable statute of limitations during the pendency of the class. Once certification was denied or revoked, the statute of limitations was no longer tolled. Based on this holding, the Petitioners' claims expired December 16, 1991. In fact, counsel was advised by the Court that the applicable statute of limitations would expire on this date at the time of the decision denying their certification as a class. The subsequent filing of the Petitioners' actions, two years after the Court's Order and warning was untimely.

The Petitioners filed a Notice of Appeal of the District Court's August 15, 1994 Order to the United States Court of Appeals for the Third Circuit. By Opinion and Order issued July 18, 1995, the Third Circuit affirmed the District Court's decision.

ARGUMENT IN OPPOSITION TO ISSUANCE OF WRIT OF CERTIORARI

The Decision of the Third Circuit Court of Appeals Applying Pennsylvania Law does not Conflict with Decisions of this Court.

The decision of the Third Circuit Court of Appeals affirming the District Court's grant of the Defendants' Motion to Dismiss does not conflict with decisions of this Court. The Petitioners rely on this Court's decision in

Fidelity Union Trust Company v. Field, 311 U.S. 169 (1940) in arguing that such a conflict does exist. In *Fidelity Union Trust Company*, this Court held that:

> The highest state court is the final authority on state law . . . , but it is still the duty of the federal courts, where the state law supplies the rule of decision, to ascertain and apply that law even though it has not been expounded by the highest court of the state. An intermediate state court in declaring and applying the state law is acting as an organ of the state and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question.

Fidelity Union Trust Company, 311 U.S. at 177 (citations omitted).

In concluding that the statute of limitations in Pennsylvania is not tolled during the pendency of an appeal from an order denying class certification, the District Court and Circuit Court properly applied the law as stated by the Pennsylvania Supreme Court, the Commonwealth's highest state Court.

A. Pennsylvania Supreme Court's Decision in *Cunningham*

In *Cunningham v. Insurance Company of North America*, 515 Pa. 486, 530 A.2d 407 (1987), the Pennsylvania Supreme Court set forth its most precise discussion regarding the impact of a class action upon the statute of limitations for the individual class members. There, the insureds brought a class action against a single insurer seeking to recover postmortem work loss benefits

through no-fault automobile insurers. Prior to the filing of the *Cunningham* action, a similar class action had been filed in *Nye v. Erie Insurance Exchange*, 504 Pa. 3, 370 A.2d 98 (1983). The *Nye* class action was decertified prior to the filing of the *Cunningham* action. The defendant insurer moved for summary judgment arguing that the *Cunningham* claim was barred by the expiration of the applicable statute of limitations. The trial court granted the defendants' motion rejecting the plaintiffs' contention that the class action in *Nye* tolled the statute of limitations. The Pennsylvania Superior Court, an intermediate appellate court, reversed finding that the *Nye* action in fact tolled the statute of limitations period. *Brunda v. Home Insurance Company*, 353 Pa.Super. 146, 509 A.2d 377 (1985). The Pennsylvania Supreme Court granted allocatur and reversed.

The Pennsylvania Supreme Court restated the principle that the filing of a class action normally tolls the statute of limitations for all putative plaintiffs in the class. Further, the Court recognized that the tolling issue becomes important once the certification of the class action occurs. While the decertification in *Nye* resulted from the fact that the representative lacked standing to bring the action, the Supreme Court's analysis of the effect of decertification is compelling and relevant to the issue which was presented to the District Court and the Third Circuit in this case.

The Pennsylvania Supreme Court recognized the inherent unfairness in unilaterally extending the tolling effect of a class action once the class has been decertified.

Such a result would work injustice to the general principles supporting the creation of statutes of limitations. The Court noted:

> Statutes of limitations embody important policy judgments that must be taken into account in determining the scope of application of the tolling principle. Those policy judgments include a belief that defendants should be protected against the prejudice of having to defend against stall claims, as well as the notion that, at some point, claims should be laid to rest so that security and stability can be restored to human affairs. The defense of the statute of limitations is not a technical defense but rather is a substantial and meritorious one, and has been regarded as favored in the law and advancing the welfare of society.

530 A.2d at 409.

In setting forth these policy considerations, the Supreme Court cited two of its prior decisions: *Insurance Company of North America v. Carnahan*, 446 Pa. 48, 284 A.2d 728 (1981) and *Schmucker v. Naugle*, 426 Pa. 203, 231 A.2d 121 (1967).

Additionally, the Court discussed and approved of the rationale supporting this Court's decision in *American Pipe and Construction Company v. Utah*, 414 U.S. 538 (1974) and its progeny. The *Cunningham* Court found that this case law:

> . . . was based upon the need to promote efficiency and economy of litigation, recognizing that, unless tolling was afforded, class members

> would not be able to rely on the existence of the suit to protect their rights.

530 A.2d at 410.

However, the Court also recognized the threat of abuse of such a rule and adopted the well-reasoned rationale of Mr. Justice Blackmun in his concurring opinion in *American Pipe*:

> Our decision . . . must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally to attract and save members of the purported class who have slept on their rights.

Id., citing American Pipe.

Finally in its analysis, the *Cunningham* Court noted that counsel for plaintiff was the same counsel on behalf of the putative class in *Nye* and that the *Nye* complaint sought a class action against thirty-one insurers even though the plaintiffs' counsel represented a single insured in an attempt to toll the statute of limitations as to all carriers. The Court recognized that counsel was attempting to protect many potential plaintiffs with claims against the thirty other insurers who would not otherwise act upon their rights prior to the expiration of the applicable statute of limitations. The Court disapproved of this tactic to toll the statute stating:

> We regard such an action as a clear abuse of the goals of class action procedures. The procedures do not exist to sanction what would be regarded by many as a course of officious intermeddling on the part of counsel, who, motivated by concern for plaintiffs who would not otherwise file suits, has embarked on a course of initiating

> litigation on behalf of those who have slept on their rights. Indeed, this case presents a most compelling example of tactics employed to subvert the legislative intent embodied in the statute of limitations, and the rules governing tolling will not be extended to give effect to such tactics.

530 A.2d at 410.

The conduct of plaintiff's attorney in *Cunningham* which the Pennsylvania Supreme Court found so offending and improper is virtually indistinguishable from the course charted by the Petitioners' counsel in this case. The filing of the initial class action was simply an attempt to protect the rights of those women with no express interest in proceeding with individual cases. It is undisputed that Petitioners' counsel discussed this matter with many of the purported class members prior to the initial filing of the lawsuit. In fact, Plaintiff secured Affidavits from many members of the putative class. (See Appendix to Amended Complaint.) Recognizing that the statute of limitations was running quickly and only receiving commitments from, at that time, four individuals to proceed in their own right, Plaintiff's counsel simply concocted a class action in order to invoke the umbrella of protection generally afforded putative class members and thereby buying time to entice more women into pursuing the litigation. Contrary to the assertions of the Petitioners, this type of activity has been specifically addressed by the Pennsylvania Supreme Court and rejected as improper.

Petitioners' argument fails to address the clear import of *Cunningham* and seeks to manipulate a decision

of an intermediate Pennsylvania appellate court in an effort to persuade this Court that the Third Circuit has ignored this Court's holding in *Fidelity Union & Trust.*

B. Pennsylvania Rule of Civil Procedure 1701

Further evidence of the Pennsylvania Supreme Court's rule with regard to the tolling of the period of limitations in class action cases is demonstrated by Pennsylvania Rule of Civil Procedure 1701. In Pennsylvania, the General Assembly has vested the Supreme Court with the power to prescribe by general rule the practice and procedure in civil actions for the courts of common pleas. Act of June 21, 1937, P.L. 1982, *as amended* 17 P.S. § 61 et seq. (repealed). This concept was incorporated into the Constitution of 1968, Article V, Section 10(c) which continued to vest in the Supreme Court, "the power to prescribe general rules governing practice, procedure and the conduct of all courts. . . . " This constitutional provision is now implemented by Section 1722 of the Judicial Code, 42 Pa.C.S. § 1722.

Pennsylvania Rule of Civil Procedure 1701 provides:

> (a) As used in this chapter
>
> 'Class action' means any action brought by or against parties as representatives of a class until the court by order refuses to certify it as such or revokes a prior certification under these rules.
>
> (b) Except as otherwise provided in this chapter, the procedure in a class action shall be in accordance with the rules governing the form of action in which relief is sought.

An explanatory note to Rule 1701 recognizes that the definition of the term class action incorporates this Court's decision in *American Pipe*.

> This definition becomes important in determining the effect of the commencement of a class action as tolling the statute of limitations as to the members of the class other than the named representative. It carries into effect the decision of the United States Supreme Court in *American Pipe and Construction Company v. State of Utah*, 414 U.S. 538, 94 S.Ct. 756, 38 L.Ed.2d 713 (1974), in which the court held that the commencement of a class action *suspends* the applicable statute of limitations during the interim period from commencement until refusal to certify as to all putative members of the class who would have been parties if the action had been certified as such.

(Emphasis added.)

It is undisputed that under Pennsylvania law the filing of a class action simply suspends the running of the applicable statute of limitations until the class certification issues are resolved. Once certification is denied, the applicable statute of limitations continues to run from the date of the decision on class status.

The Pennsylvania Supreme Court has clearly indicated its position with regard to this question both in *Cunningham* and its promulgation of Pennsylvania Rule of Civil Procedure 1701. The Petitioners' reliance on the decision of an intermediate appellate court in Pennsylvania is, therefore, erroneous. The United States District Court for the Western District of Pennsylvania and the United States Court of Appeals for the Third Circuit

properly adhered to this Court's holding in *Fidelity Union Trust* and, in applying Pennsylvania law, relied on principles enunciated by the highest court of Pennsylvania, its Supreme Court.

CONCLUSION

For the foregoing reasons, the Respondents contend that the decision of the United States Court of Appeals for the Third Circuit was in full accordance with the decisions of this Court. The Respondents, therefore, respectfully request that this action be concluded and that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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